



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

November 3, 1995

Mr. Leonard W. Peck, Jr.
Assistant General Counsel
Texas Department of Criminal Justice
P.O. Box 99
Hunstville, Texas 77342-0099

OR95-1189

Dear Mr. Peck:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. We assigned your request an identification number, ID# 30986.

The Texas Department of Criminal Justice (the "department") has received a request for information detailing the settlement of a claim by Vernon Masonry, Inc., a subcontractor performing services on a prison being built in Livingston, Texas. Specifically, the requestor seeks the following:

1. A copy of Vernon Masonry's claim relating to disputed grouting issue of CMU masonry walls on the . . . project.
2. Any supplemental claim documents on the disputed grouting issue of CMU masonry walls.
3. TDCJ's final determination and/or final decision regarding the above claim and any related support documents related to the decision.
4. Details of the settlement of the . . . matter including settlement amount.

You have submitted copies of the requested documents for our review. *See* Gov't Code § 552.303 (requiring governmental body that requests attorney general decision on open records request to supply to attorney general specific information requested). The information includes copies of letters between the department or its construction manager, The Mays Companies, and the contractor, Blount, Inc., and subcontractor, Vernon Masonry, Inc., whom you refer to as the "claimants." *See* Letter from Leonard W. Peck, Jr., Assistant General Counsel, Texas Department of Criminal Justice, to Dale Ann Bean Underwood, Legal Assistant, Office of the Attorney General Opinion Committee (Apr. 7, 1995). The information also includes a memorandum from an attorney in the department's engineering division summarizing and evaluating the claim and a letter to the department from The Mays Companies evaluating Vernon Masonry's claim. Finally, we find a departmental inter-office communication prepared to accompany several records documenting the claim.

You claim section 552.103 of the Government Code excepts all of the requested information from required public disclosure. In the alternative, you claim sections 552.107 and 552.111 except those portions of the requested information that have not been sent to or received from Blount or Vernon Masonry. In your initial letter to this office, you also raised sections 552.104 and 552.110 of the Government Code, but because you did not raise the sections in a subsequent letter briefing your claims, we assume that you have waived sections 552.104 and 552.110.¹

Section 552.103(a) of the Government Code excepts from required public disclosure information

(1) relating to litigation of a civil or criminal nature or settlement negotiations, to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party; and

(2) that the attorney general or the attorney of the political subdivision has determined should be withheld from public inspection.

¹In any event, section 552.104 is inapplicable once a governmental body has awarded the contract on a project. *See, e.g.,* Open Records Decision No. 541 (1990) at 5, 514 (1988) at 2, 319 (1982) at 3. The department has awarded the contract on the project from which Vernon Masonry's claim arose.

Section 552.110 requires that a governmental body or a third party establish a *prima facie* case that requested information constitutes a trade secret. *See* Open Records Decision No. 552 (1990) at 5. Neither you nor either of the parties involved have attempted to prove a *prima facie* case that all or part of the requested information constitutes trade secret.

To secure the protection of section 552.103(a), a governmental body must demonstrate that requested information "relates" to a pending or reasonably anticipated judicial or quasi-judicial proceeding. Open Records Decision No. 551 (1990). Absent special circumstances, however, once all parties to litigation have obtained information, e.g., through discovery or otherwise, a governmental body has no section 552.103(a) interest to justify withholding that information. Open Records Decision Nos. 349 (1982) at 2, 320 (1982) at 1.

The requested information clearly relates to settlement negotiations to which the state is a party. In our opinion, because settlement negotiations are pending, the department may be said to "anticipate" litigation for purposes of section 552.103. Accordingly, the department may withhold from the requestor those documents that Blount or Vernon Masonry have not seen. With regard to the information we have concluded the department may withhold under section 552.103, our conclusion is good only until the litigation concludes. Attorney General Opinion MW-575 (1982) at 2; Open Records Decision No. 350 (1982) at 3.

On the other hand, section 552.103 does not authorize the department to withhold any of the correspondence between the department or its construction manager, the Mays Companies, and Blount or Vernon Masonry. Furthermore, as you have waived sections 552.107 and 552.111 with regard to such correspondence, we conclude the department must release it to the requestor. For your convenience, we have marked the information we believe the department may withhold. You should review our markings to ensure that the claimants have not, in fact, already seen the documents.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and may not be relied upon as a previous determination under section 552.301 of the Government Code regarding any other records. If you have questions about this ruling, please contact this office.

Yours very truly,



Kymerly K. Oltrogge
Assistant Attorney General
Open Records Division

KKO/LRD/rho

Ref.: ID# 30986

Enclosures: Marked documents

cc: Ms. Diane Butler
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